89-1954

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

ANTHONY SANTIAGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF ANTHONY SANTIAGO

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Questions Presented

1. Where the substantive language of Title 18 U.S.C. §656, under which statute Petitioner was convicted, has not been defined or explained by this Court, as to the conduct which is proscribed by the statute, can such conviction stand?

2. Where the decision of the Court below is inconsistent with its own precedent thereby creating confusion as to the application of Title 18 U.S.C. §656 should this Court review Petitioner's conviction under that statute?

3. Where there is disagreement among the Circuit Courts of Appeals as to the conduct proscribed by Title 18 U.S.C. §656, should this Court put such disagreement to rest?

Parties to the Proceeding

Co-Defendants, at the trial, were PETER J. CASTIGLIA, JACK LIFFITON, and RICHARD TOCHA.

TOCHA was acquitted of all charges, by the jury.

Co-Defendants/Appellants, on the appeal to the Second Circuit Court of Appeals were CASTIGLIA and LIFFITON.

Separate petitioners for writ of certiorari will be presented to this Court by LIFFITON and CASTIGLIA. This petition for writ of certiorari is presented on behalf of ANTHONY SANTIAGO.

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PETITION FOR WRIT OF CERTIORARI ON BEHALF OF ANTHONY SANTIAGO

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit as well as the Petition for rehearing which was denied on March 20, 1990.

Citation to Opinion Below

The opinion of the Court of Appeals is published in 894 F.2d 533 (2d Cir. 1990) and is reproduced in Appendix A, *infra*.

Jurisdiction

The Petition for Rehearing was denied by the Court of Appeals on March 20, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statute Involved

Petitioner was convicted on 3 counts, each involving a separate statute but the convictions under the other two statutes depend upon the conviction for misapplication of bank funds, in violation of Title 18 U.S.C. §656 which provides:

> §656. Theft, embezzlement, or misapplication by bank officer or employee
>
> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody and care of such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both;

Statement of the Case

On May 23, 1985 Petitioner was indicted under the first three counts of a multi-count indictment charging him with violation of Title 18 of the United States Code §371, §656 and §2 and §1005 and §2.

Essentially, the allegations in the indictment claimed that Petitioner took out a loan in the amount of $580,000 from the Bank of New York ostensibly for his own benefit, when in fact the loan was taken out for the benefit of Castiglia who was a loan officer for the Bank of New York and Liffiton, another customer of the Bank.

The conspiracy portion of the indictment alleged that Petitioner understood that he would not be held responsible for repayment of the $530,000 loan, and that he participated in the concealment of the true nature of the loan.

In September of 1981 when the $580,000 loan was made, Petitioner had been a valued customer of the Bank of New York for many years. Over that period of time he had borrowed millions of dollars from the Bank of New York and had repaid all of it.

In view of his past relationship with the bank, Petitioner was not required to fill in a loan application form but simply signed an unsecured demand/time note. There is no testimony that the note was irregular in any manner such as by the use of sham names, false data or "paper" corporations. Government witnesses testified that the loan was properly handled on the bank's books and the entire transaction showed up on the bank's records.

The only other documents that were signed by Petitioner in regard to this loan transaction were an unsecured demand/time note signed in September 1982 renewing a portion of the original loan, Petitioner's check in the amount of $505,000 made payable to Castiglia's attorney and a bank form confirming the loan for $580,000.

The indictment alleged that Petitioner understood that he would not be held responsible for repayment of the loan. However, the government's proof showed that Petitioner prepaid interest on the note from September, 1981 to July 1982 and paid the interest from July 1982—August 30, 1982. When Petitioner signed the renewal note for $180,000 in September 1982 after Castiglia arranged a $400,000 paydown, he thereafter paid the interest on that note from September 1982 to December 1982. He paid the $180,000 principal balance in December 1982.

In addition, Petitioner's acknowledgement that he was always responsible on the note was confirmed by the testimony of a government witness; also through the bank's confirmation form which he signed and through a letter addressed to his accountant.

When Petitioner turned over the loan proceeds to Castiglia's attorney it was understood that this was a loan from Petitioner to Castiglia which was going to be used by Castiglia to clear up certain obligations of a corporation owned by Castiglia. Castiglia intended to repay his loan to Petitioner by July of 1982 when Petitioner's $580,000 note became due.

Castiglia's loan was not paid by July 1982. Castiglia arranged a paydown of $400,000 on Petitioner's loan in September of 1982 through funds obtained by a bank

loan to a corporation, owned by former defendant, Richard Tocha. The balance of $180,000 was paid by Petitioner in December of 1982.

In 1983 Petitioner's accountant and his attorney, who were both government witnesses, took steps on Petitioner's behalf to protect the obligation Castiglia continued to owe relative to the loan made by Petitioner to Castiglia. A series of meetings in this regard culminated in a security arrangement. Later on it was necessary to enforce the security agreement when the loan was not paid.

It is alleged that Petitioner's participation in the concealment of the true nature of the loan transactions basically commenced with the paydown of the $400,000 on the $580,000 loan in September, 1982. That conduct allegedly, includes meetings in 1983 to arrange security for the loan Petitioner made to Castiglia as well as meetings in 1984 relative to the enforcement of that security arrangement.

The government was unable to prove that the bank funds on the $580,000 loan were ever at an increased risk. The government admitted in its response to Petitioner's demand for a bill of particulars, that it made no claim that Petitioner was at any time financially incapable of repayment of the $580,000 loan. This fact was stipulated to by the government attorney at trial.

There was no proof that Petitioner was instrumental in any way in the creation of the $400,000 loan. These funds were also not at an increased risk. A government witness testified that at the time the loan to former Defendant's corporation was made the Company was financially sound.

In addition, the indictment charged that Castiglia had exceeded his authority as a loan officer with respect to Liffiton at the time the $580,000 loan was made to Petitioner, allegedly for the benefit of Castiglia and Liffiton. The government admitted in its response to Petitioner's demand for a bill of particulars that it made no claim that Petitioner had knowledge concerning outstanding Liffiton loans nor that he knew that Castiglia had exceeded his authority as a loan officer with respect to Liffiton.

Reasons the Writ Should be Granted

Count III of the Indictment in this case charged:

> 1. Between on or about September 22, 1981 and on or about November 12, 1981, at Buffalo, New York and elsewhere in the Western District of New York, the defendant PETER J. CASTIGLIA, who was at the time stated an employee and officer of the Bank of New York, Western Region, a bank the deposits of which were insured at the time by the Federal Deposit Insurance Corporation, knowingly and willfully embezzled, abstracted, purloined and misapplied and caused to be misapplied, monies and funds of the Bank of New York, Western Region with the intent to injure, defraud and deceive that bank, by causing a loan in the amount of $580,000.00 to be issued in the name of the defendant ANTHONY H. SANTIAGO and by causing the proceeds of that loan to be disbursed for the benefit of himself, that is, PETER J. CASTIGLIA, and for the benefit of the defendant JACK LIFFITON.
>
> 2. On or about and between the dates set forth above, the defendants, JACK LIFFITON and ANTHONY SANTIAGO, aided, abetted, counseled, induced, procured and caused the commission of this offense.

All in violation of Title 18, United States Code, Section 656 and Section 2.

Petitioner's demand during discovery proceedings after indictment for a description of the conduct by Petitioner constituting a violation of Title 18, U.S.C. §656 were all declined by the government on the grounds that the various inquiries sought matters of evidence. The case therefore went to trial in the posture that there was a misapplication of bank funds, with no averments in the Indictment to demonstrate the conduct of Petitioner which was claimed to be illegal.

At the time of trial (1988) the law of the Second Circuit in a case most closely associated with the fact pattern in this case was *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972). The dissent in the case below found the present cause indistinguishable from the *Docherty, supra*, case.

The majority of the Court below questioned whether *Docherty, supra*, would be decided the same way today, citing in support of that observation a Federal statute (12 U.S.C. §375 B) in regard to bank loans to its officers which became law seven years after the time of the offense charged in this case and three years after the indictment. This statute was never cited or discussed at any time up until it was cited by the Court below. Also cited was an earlier Second Circuit case *United States v. Fortunato*, 402 F.2d 79 (2d Cir. 1968) and several cases from other Circuits which the Court stated have held that the mere making of a bank loan by an officer for his own benefit, concealing his interest from the bank would constitute willful misapplication. However, the Court below did not clearly overrule its earlier *Docherty, supra*, decision.

The term "willfully misapplied" as stated in Title 18 U.S.C. §656 and, as charged in the indictment is, standing alone, meaningless:

> The words "willfully misapplied" are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like the words "embezzle," as used in the statutes, or the words "steal, take and carry away," as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to

aver that the defendant "willfully misapplied" the funds of the association. (*United States v. Britton*, 107 U.S. 655, 669, 2 S. Ct. 512).

In the 108 years that have passed since the *Britton, supra*, decision the term "willfully misapplied" still has no settled technical meaning despite the efforts of Courts down through the years to explain what the term means:

—the phase "willfully misapply" has proved troublesome from the outset (*United States v. Docherty, supra*);

—willful misapplication means criminal misapplication rather than a mere act of maladministration (*United States v. Moraites*, 456 F.2d 435 (3d Cir. 1972); *United States v. Meyer*, 266 F.2d 747 (5th Cir. 1959));

—willfully misapplies does not connote a precise or specific form of conduct (*United States v. Krepps*, 605 F.2d 101, (3rd Cir. 1979));

—willful misapplication is "flexible" in its meaning; it can be described "loosely" (*United States v. Krepps, supra*);

—misapplication is something other than embezzlement or abstraction; it is something improper and unjustified; it is something more than bad judgment or maladministration (*United States v. Wilson*, 500 F.2d 715 (5th Cir. 1974)).

The apparent frustration of the Courts in wrestling with this term has led to a determination in several Circuits that a bank officer can be in violation of the statute simply by making a loan for his own benefit, concealing his interest from the bank. This enforces the law but not in terms in which the law is written.

United States v. Gens, 493 F.2d 216 (1st Cir., 1974) apparently was the first attempt to define the term "willfully misapplies" in terms of the patterns of conduct

of the alleged wrongdoer rather than by substituting other equally meaningless phrases. The *Gens, supra,* court discussed that a review of the cases indicated 3 fact patterns that regularly occur loans of the nature involved in this case. Those patterns are:

> 1. Those cases in which bank officials know the named debtor is either fictitious or the person is unaware their name is being used.
>
> 2. Those cases in which the bank officials know the named debtor is incapable of repaying the loan whose proceeds have been passed on to a third party.
>
> 3. Those cases in which bank officials assure the named debtor they will only look to the third party who actually received the loan proceeds for repayment. The debtor's financial capability does not come into play under this category.

Relying on the law as it was understood to be at the time of trial, the government tried this case on the basis that the case fell into the third *Gens, supra,* category because it was charged that bank officer Castiglia assured Petitioner at the time the loan was made to him that he would not be held responsible for its repayment.

By abandoning the *Gens, supra,* methodology of full fact finding of conduct and instead, by approving a strict statutory standard of conduct which standard did not even exist either at the time of the alleged commission of the crime or at trial, the Court below has thrown the state of the law on this subject into confusion. See the dissent of Judge Winter in *United States v. Castiglia,* 894 F.2d 533, 539 (2d Cir. 1990), Appendix P. 15 a.

Conclusion

The statute under which Petitioner was convicted has never been satisfactorily defined by this Court or any other Court, although many attempts have been made to do so. This problem has been compounded by the fact that there is disagreement among the Circuits in the application of the Title 18 U.S.C. §656 so that conduct deemed criminal in one Circuit may be deemed perfectly legal in another Circuit. Now, in this case the Court is confronted with a determination by the Court below which creates confusion within a single Circuit as to what standard of conduct is proscribed by the statute. This is an appropriate time to resolve this issue. This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, January 17, 1990.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 327, 328, 558—August Term, 1989

(Argued November 8, 1989 Decided January 17, 1990)

Docket Nos. 89-1207, 89-1209, 89-1216

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER J. CASTIGLIA, JACK LIFFITON AND ANTHONY SANTIAGO,

Defendants-Appellants.

Before:

KAUFMAN, TIMBERS AND WINTER,

Circuit Judges.

Appeal from judgments of the United States District Court for the Western District of New York (Elfvin, *J.*) convicting defendants, after a jury trial, of conspiracy, misapplication of bank funds, and making false entries in bank records. Appellant Jack Liffiton was also convicted of perjury.

Affirmed.

Judge Winter concurs in part and dissents in part in a separate opinion.

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CHARLES H. DOUGHERTY, Buffalo, New York (Albrecht, Maguire, Heffern & Gregg, Buffalo, New York, of counsel), *for Defendant-Appellant Anthony Santiago.*

JACK D. LIFFITON, Getzville, New York, *pro se.*

GRETCHEN L. WYLEGALA, Assistant United States Attorney, Buffalo, New York (Dennis C. Vacco, United States Attorney for the Western District of New York, Denise E. O'Donnell, Susan M. Barbour, Assistant United States Attorneys, Buffalo, New York, of counsel), *for Appellee.*

KAUFMAN, *Circuit Judge*:

This case requires us to decide whether a bank officer abused his control of the bank's money—through a series

of allegedly sham loans that appellants portray as innocent creative financing—to the point of violating the law.

Peter Castiglia, the bank officer, Jack Liffiton, and Anthony Santiago appeal from judgments of conviction entered in the United States District Court for the Western District of New York after a jury trial before Judge Elfvin. Appellants' primary contention is that the Government has stretched the statute prohibiting "misapplication" of bank funds by a bank officer, 18 U.S.C. § 656, beyond its legitimate contours, thereby criminalizing perfectly proper business transactions. We are asked to rule that no "misapplication" occurred and that this prosecution represents an overzealous use of a criminal statute in an inappropriate situation. We decline to do so, since persuasive proof at trial established that the defendants carried out a complex and audacious scheme to obtain bank funds in a manner long recognized as misapplication. Because we also reject appellants' other challenges, we affirm the convictions.

The jury found that Castiglia, as Senior Commercial Lending Officer at the Buffalo branch of the Bank of New York ("BONY"), orchestrated a duet of sham loans with the assistance of named borrowers Santiago and Tocha, both of whom were assured that they would not be responsible for repayment of the loans. The real beneficiaries of the loan proceeds were Castiglia, his corporate alter ego (Geneva Lands, Inc.), and a friend (Liffiton)—none of whom were eligible to receive these loans directly without special authorization from Castiglia's superiors. Since appellants challenge the sufficiency of the evidence supporting their convictions, we begin with an abbreviated summary of what the jury could have found, viewing the evidence in the light most favorable to the Government, as

we are required. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

In September 1981, as we already noted, Castiglia was Senior Commercial Lending Officer at BONY, an FDIC-insured institution. BONY's internal regulations restricted Castiglia's authority. He could not make personal or commercial loans to himself without bank approval,[1] nor could he authorize more than one million dollars in aggregate unsecured loans to any one borrower. He was required to disclose any outside business or partnership relationships, particularly any such relationships with bank customers.

Despite these rules, Castiglia failed to report to BONY his exclusive ownership of Geneva Lands, a real estate holding company. Castiglia and Geneva Lands were as one. He borrowed money from other banks in the corporate name for personal purposes, and listed himself as the sole shareholder on the corporate tax returns.

In September 1981, Castiglia arranged for a $580,000 BONY loan to be issued in Anthony Santiago's name. Utilizing an attorney escrow account, Castiglia directed the funnelling of these funds through a series of circuitous transactions. By mid-November $505,000 had been laundered into various accounts belonging to Castiglia, Geneva Lands, and Liffiton.[2] Liffiton, whose unsecured BONY loans already exceeded BONY's one million dollar limit, received four checks totalling $188,000. Although Castiglia subsequently completed several bank Code of

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1 12 U.S.C. § 375a limits the instances in which a bank may extend credit to its officers and requires prompt reporting to the board of directors of any such loan.

2 $71,443.29 in prepaid interest was held by the bank. Santiago retained over $3,500.

Conduct Questionnaires, he failed to disclose his interest in Geneva Lands and the $580,000 loan that had benefitted him, his company, and Liffiton.

Appellants claim that Santiago recognized his obligation to repay the $580,000 and simply reloaned the principal. Santiago, however, did not enter the loan on his books. He merely instructed his bookkeeper to put a copy of the loan note in Castiglia's file. As a precaution against Castiglia's inability to repay the loan in the event of death, Santiago expected to be named beneficiary of a $580,000 insurance policy on Castiglia's life. Even though his substantial interest payment entitled him to a large tax deduction, Santiago's accountants were not informed of the loan. Nor did he repay the loan when it became due in June 1982. Instead, Castiglia arranged for it to be renewed.

Upon learning that Geneva Lands was under federal investigation, Castiglia immediately arranged to pay off the $580,000 debt. Within 48 hours, he convinced his friend Richard Tocha to borrow $400,000 from BONY, and applied this sum to the outstanding loan. The remaining $180,000 balance was exchanged for a demand note in Santiago's name. Castiglia then arranged with Santiago to retire the $180,000 loan by selling stock that BONY held as collateral on another debt, putting the bank at risk.

When Santiago's accountant learned of the original loan, after Castiglia's resignation from the bank, Santiago explained that he borrowed the money for Castiglia, who handled all the transactions and was responsible for repayment of the loan. Concerned about the lack of loan documentation and Castiglia's imminent surgery, Santiago's accountant obtained from Castiglia a personal promissory note for $180,000. Following surgery, however, Castiglia

substituted Geneva Lands as the obligor on this note and conveyed an explanation to Santiago's attorney and accountant which concealed his personal interest in the loan. Santiago adopted this characterization.

In an interview with the FBI, Tocha echoed Santiago, claiming that he was assured upon signing the $400,000 note that he would not be called upon to pay the principal or interest.[3] Both Santiago and Tocha looked to Castiglia for the interest payments. Santiago instructed his bookkeeper to call Castiglia if interest payments were late on the $180,000 loan. Tocha added the interest due on the $400,000 loan to bills sent to Castiglia for construction work performed by Tocha.

Despite a frantic effort to conceal the convoluted transactions—including the alteration of records and an attempt by Liffiton to induce Santiago to shield Castiglia with false testimony—Castiglia, Liffiton, and Santiago were convicted of conspiracy, 18 U.S.C. § 371, and a variety of substantive offenses linked to the misapplication of funds.[4] Only Tocha was acquitted of all charges. While

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3 Tocha recanted at trial, denying he made such a statement.

4 Specifically, Castiglia was convicted on two counts of misapplication of bank funds. 18 U.S.C. § 656. Liffiton and Santiago were convicted of aiding and abetting the $580,000 misapplication. 18 U.S.C. § 2. Castiglia was convicted of making, and Santiago with aiding and abetting the making of, false entries in bank records for the $580,000 loan. 18 U.S.C. §§ 1005, 2. Castiglia was convicted of the same offense with respect to the $400,000 loan, and for false entries on the bank Code of Conduct Questionnaires. Liffiton was also convicted of perjury before the grand jury. 18 U.S.C. § 1623. Judgments of conviction were entered for Castiglia and Liffiton on April 17, 1989, and for Santiago on May 1, 1989.

Castiglia was sentenced to 4 concurrent one year terms of imprisonment for conspiracy, two false entries, and the $580,000 misapplication. He also was sentenced to two concurrent one year terms for the $400,000 misapplication and false entry. Liffiton was sentenced to con-

appellants raise a multitude of contentions, we shall discuss in some detail their central claim that no "misapplication" occurred.

An officer of a federally-insured bank who "embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds, or credits" of the bank with the intent to injure, defraud or deceive that bank commits a criminal misapplication. 18 U.S.C. § 656; *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972). Castiglia was an officer of BONY, a federally-insured institution. Thus, the only issue before us is whether Castiglia's conduct amounts to willful misapplication.

Appellants contend that we are precluded from finding misapplication because Tocha and Santiago were financially able to repay their loans and recognized their legal obligations to do so. Their argument purportedly rests on our decision in *United States v. Docherty* and finds support in the First Circuit's opinion in *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974). In *Docherty* we held that there was no misapplication where the borrower had ample resources and "knew he was putting his own credit on the line." 468 F.2d at 995. *Gens* held that "where the named debtor is both financially capable and fully understands that it is his responsibility to repay, a loan to him cannot—absent other circumstances—properly be characterized as sham or dummy . . . ." 493 F.2d at 222.

It appears that both Santiago and Tocha had the resources to pay the loans and had executed all the relevant documents. Accordingly, Appellants assert that this

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current one year terms for conspiracy and misapplication with a consecutive year for perjury. Santiago was sentenced to three years probation and a $7,500 fine. Execution of all sentences was stayed during appeal.

settles the issue. However, this contention ignores one long recognized category of misapplication:

> cases in which bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds: in other words where the debtor allowed only his name to be used, enabling the bank officials to grant a *de facto* loan to a third party to whom the bank was unwilling to grant a formal loan.

Id.; *see also United States v. Cleary*, 565 F.2d 43, 47 (2d Cir. 1977) (misapplication occurs where bank official assures named debtor he would not be called upon to repay), *cert. denied*, 435 U.S. 915 (1978). Such a formally executed loan "could be characterized as 'sham' or 'dummy' . . . , because there was little likelihood or expectation that the named debtor would repay." *Gens*, 493 F.2d at 222.

The key issue is whether the named borrowers fully understood and recognized their obligations to repay. "[L]oans of this character are improper only if the lending officer had no reason to expect that the named debtor would repay them; *e.g.*, where the officer knew that the named debtor was fictitious, had not authorized the use of his name, or was incapable of repaying the loan, or where the bank official assured the named debtor that he would not be called upon to repay." *Cleary*, 565 F.2d at 47 (*citing Gens*, 493 F.2d at 221-23). Since *Gens* accurately defines misapplication to include situations where the bank official assured the named borrower that he would not be responsible for repayment—as all appellants concede—it necessarily follows that a signature on loan documents does not conclusively establish an intent to

repay. Intent must be interpreted in light of the evidence that the bank official assured the named borrower that he would not be looked to for repayment because the officer would repay. Where such evidence is persuasive, misapplication has been established.

For example, in *Gens* the First Circuit reversed the convictions of nominee borrowers who recognized their repayment obligations, but remanded the one count involving a wealthy individual who signed his note with the understanding that he personally would not have to repay the loan, barring some "catastrophe." 493 F.2d at 220, 223. *See also United States v. King*, 484 F.2d 924, 926-27 (10th Cir. 1973) (nominee borrower signed note with the understanding that bank official would actually repay loan), *cert. denied*, 416 U.S. 904 (1974); *United States v. Moraites*, 456 F.2d 435, 438 (3d Cir.) (nominee borrower signed notes after bank officer assured it it would not have any obligation to repay), *cert. denied*, 409 U.S. 891 (1972). Nothing in *Docherty* suggests that such assurances were extended to the nominee borrower. The bank officer only "requested that Docherty borrow [money] and reloan it to him," apparently without making the additional representation that he would not be looked to for repayment. 468 F.2d at 991.

In the instant case, the record amply supports the conclusion that Castiglia assured each named debtor that "he would not be called upon to repay" the loan. *Cleary*, 565 F.2d at 47. Santiago admitted this to his accountant; Tocha stated so to the FBI. Other evidence—Santiago's unusual bookkeeping, Tocha's method of billing Castiglia for interest, Liffiton's attempt to influence Santiago's testimony—indicates a conscious effort to conceal the sham nature of the loans.

The dissent reads into precedent a non-existent distinction between "assurances by a bank officer that the [named] borrower will not be looked to for repayment because the officer will repay and a similar [situation in which an officer] gives assurances that *the bank* will not look to the borrower [were] the loan [ ] not repaid." However, knowing participation in a sham loan which could have the natural tendency to harm the bank is sufficient to find a principal liable for misapplication, *see Gens*, 493 F.2d at 222, even though mere knowledge of a nominal borrower that a transaction violates a bank rule would not support a conviction for aiding and abetting. *Docherty*, 468 F.2d at 993.

By assuring the named borrowers that they would not have to repay the loans, Castiglia manifested the criminal intent to enter into sham transactions at the risk of the bank. While the dissent believes that Castiglia's statement to Santiago that he would not be looked to for repayment "could as well describe the borrower in *Docherty*," it is significant that these words were not *ascribed* to the bank official in that case. This is the distinction that makes all the difference.

In *Docherty*, the bank official convinced a nominal borrower to obtain a loan for the benefit of the former at no risk to the bank. In contrast, Castiglia persuaded Santiago to lend his name to a similar transaction, adding the assurance that Castiglia was responsible for repayment. The natural effect of such an assurance would be to cause the named borrower to believe that he would not have to repay the loan and that, one way or another, the bank officer would discharge the obligation. This amounts to willful misapplication of bank funds.

The fact that Santiago may have believed that he would be ultimately liable in the event the note was not repaid does not absolve Castiglia of his wrongful intent when entering into the loan. Moreover, Santiago's behavior with regard to the life insurance policy and Castiglia's execution of a formal note do not suggest that Santiago intended to repay the loan. The life insurance policy hedged against one eventuality that would prevent Castiglia from repaying the debt—his death. The issuance of the promissory note, following Castiglia's resignation from the bank, was Santiago's similar attempt to bind Castiglia to his assurance of repayment. Both suggest only that Santiago sought to hold Castiglia to his promise to repay. We note that Castiglia persuaded Santiago to change his books to conceal any personal interest of Castiglia in the series of loans.

In sum, the evidence in this case demonstrates that the borrowers had been assured that Castiglia was responsible for repaying the loans.[5] The question remains whether there was an intent to injure, defraud, or deceive the bank,

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5 Moreover, we have suggested, and other Circuits have held squarely, that misapplication occurs whenever a bank officer knowingly causes a "loan to be made to his own benefit, concealing his interest from the bank." *United States v. Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969); *United States v. Woods*, 877 F.2d 477, 479 (6th Cir. 1989); *United States v. Shively*, 715 F.2d 260, 265-66 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Steffen*, 641 F.2d 591, 597 (8th Cir.), *cert. denied*, 452 U.S. 943 (1981); *United States v. Krepps*, 605 F.2d 101, 106-07 (3d Cir. 1979); *United States v. Twiford*, 600 F.2d 1339 (10th Cir. 1979); *United States v. Kennedy*, 564 F.2d 1329, 1338-39 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978). The holdings in *Gens* and *Dòcherty* appear contrary to this line of authority. We simply note that the Third Circuit has queried whether *Gens* (and, by implication, *Docherty*) would be decided in the same way today, since in 1978 Congress severely limited the circumstances under which a bank may make loans to its officers. *Krepps*, 605 F.2d at 107 n.21; 12 U.S.C. § 375b.

the requisite *mens rea* under Section 656. *See Docherty*, 468 F.2d at 994-95. If the "natural effect" of Castiglia's conduct put BONY in jeopardy of loss, there was an intent to injure or defraud. Whether BONY suffered any actual loss is of little importance. *United States v. Clark*, 765 F.2d 297, 303-05 (2d Cir. 1985); *Cleary*, 565 F.2d at 47-48.

The bank rules that Castiglia violated were designed to protect BONY from exposure to increased pecuniary risk. Liffiton already had exceeded BONY's unsecured loan limit, yet Castiglia funnelled almost $200,000 to him. In addition, Castiglia breached bank rules and federal regulatory statutes designed to prevent bank officers from granting loans to themselves. His flouting of the safeguards necessary for BONY's security is also demonstrated by the sale of collateral pledged to another loan to pay off the $180,000 note. Evidence abounded that the natural consequence of Castiglia's deceitful and dishonest handling of bank funds was to put BONY in jeopardy of loss.

We have carefully considered appellants' other arguments and find them without merit. Accordingly, the judgments of conviction are affirmed.

WINTER, *Circuit Judge*, concurring in part and dissenting in part:

I concur in affirming Castiglia's conviction for false statements on the bank questionnaires and in Liffiton's conviction for perjury. However, I respectfully dissent from the various convictions for conspiracy, for the misapplication of bank funds, for the making of false entries in bank records concerning the loans in question, and for aiding and abetting the misapplication and false entries.

The sole reason for my dissent is my inability to reconcile the present decision with that in *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972) (Friendly, C.J.), which reversed a conviction for aiding and abetting the misapplication of bank funds and making of false statements in factual circumstances identical to the present case. In *Docherty*, one Evans, a bank officer, persuaded a credit-worthy friend, Docherty, to obtain loans in Docherty's name from the bank to be given to Evans who promised Docherty that he, Evans, would repay them. Evans told Docherty that this arrangement was necessary because the bank would not lend its funds to an officer and frowned upon officers borrowing from other banks. Docherty gave Evans the coupon book, and Evans undertook to repay the bank directly. 468 F.2d at 991.

Docherty held that the defendant's failure to disclose the real recipient of the loan, and in one instance stating that the loan's purpose was "personal," did not violate the prohibition on false statements. *Id.* at 992. It further held that "knowledge that the proceeds of the loans were going into Evans' hands in violation of the bank's internal rules," *id.* at 993, was not enough to constitute aiding and abetting of the misapplication of bank funds, *id.* at 995. The basis for this latter holding was the majority's conclusion that there was no proof that Docherty intended to injure the bank because he "knew he was putting his own credit on the line, and it [was] not suggested that he lacked the means to repay." *Id.*

The facts in the instant case are identical. Santiago was eminently credit-worthy. He had previously borrowed millions of dollars from the bank, and Castiglia was within his authority in lending the $580,000 to Santiago on his signature. The government never suggested to the jury and

has not suggested to us that Santiago's obligation to the bank was invalid. In his summation, the prosecutor characterized the transaction as a loan by the bank to Santiago and a "reloan" by Santiago to Castiglia. *See, e.g.*, Trial Transcript at 22-66 (Sept. 20, 1988). When Santiago instructed his bookkeeper to put the note in Castiglia's file, Santiago wrote a notation on the note indicating that Castiglia was going to send a life insurance policy with Santiago as beneficiary in the amount of $580,000. Later, when his accountant indicated to Santiago that he might have insufficient documentation to hold Castiglia liable if the note was unpaid, Castiglia was made to sign a promissory note for the unpaid balance and thereafter made the payments to Santiago who passed them on to the bank. Santiago's credit was thus "on the line." *See Docherty*, 468 F.2d at 995.

The purported distinction relied upon by my colleagues is that in *Docherty* the money was "reloan[ed]" to the bank officer whereas in the instant matter the borrower was told, in the words of my colleagues, "that he would not be looked to for repayment." The same statement could as well describe the borrower in *Docherty*, who gave Evans the coupon book with the expectation that Evans would repay the bank directly. The distinction relied upon by my colleagues thus escapes me. It also escapes the government, which at trial explicitly characterized the transactions as a loan to Santiago and a "reloan" to Castiglia. Finally, the distinction escapes the accountant whose testimony is the basis for my colleagues' conclusion that Santiago was told he "would not be looked to for repayment."[1]

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1 The accountant's actual testimony was as follows:

Q. Do you recall the content of that conversation you had with Mr. Santiago on this subject?

The accountant also treated the transactions as a loan to Santiago and reloan to Castiglia and therefore caused Castiglia to sign a formal note.

Confusion is certain to emanate from the present decision. In future cases, prosecutors will avoid the word "reloan" and elicit testimony from a witness that the borrower was assured that he or she would "not be looked to for repayment." Defense attorneys will get the same witness to describe the transaction as a "reloan." Any such witness, of course, like the accountant in the instant case, will understandably and correctly believe the words to mean the same thing, but district judges will then have to charge the jury that they must convict in one case but not in the other. I shrink from speculating about the result on appeal.

The actual distinction drawn by the cases, of course, is between assurances by a bank officer that the borrower

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A. In essence, I was inquiring as to his recollection as to what had transpired, when he borrowed the money, how he did, for what purpose, general conversation to try to record the transaction.

Q. Did he respond to you?

A. Yes, he did.

Q. What did he say?

A. He asked me to contact Peter Castiglia. He borrowed the money from the bank for Peter Castiglia and he took care of all the transactions.

Q. He meaning whom?

A. Mr. Castiglia.

Q. Did he make any remark at all as to who was responsible for repayment?

A. Yes.

Q. What did he say?

A. He indicated that Mr. Castiglia was responsible.

Trial Transcript at 7-227 (Aug. 24, 1988).

will not be looked to for repayment because the officer will repay and a similar officer who gives assurances that *the bank* will not look to the borrower if the loan is not repaid. My colleagues rely heavily upon a quotation from *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974), indicating that a misapplication will be found where "bank officials assured the named debtor . . . that they would look for repayment only to the third party who actually received the loan proceeds." *Id.* at 222. However, the government never claimed in the instant case that Santiago was told, much less believed, that *the bank* would not enforce the note against him. Santiago was himself in part a money lender, and the government in no way suggests that he had, or thought he had, any defense under New York law to a suit against him by the bank if the note was not paid. Indeed, although Santiago took measures to conceal the real nature of the transaction, his behavior with regard to the life insurance policy and Castiglia's later execution of a formal note clearly indicate that Santiago believed he was liable on the note if unpaid. Indeed, the government's brief describes the cause of the execution of that note by Castiglia as follows: "Santiago now *owned* [sic] money on the other loan—and immediately looked to Castiglia for payment." (Emphasis added). Brief of Appellee at 17.

The fact that Castiglia and Santiago and Liffiton engaged in devious behavior in transferring the funds is irrelevant under *Docherty*. Santiago and Liffiton may have helped Castiglia to conceal his outside employment from the bank, but that is not enough under *Docherty* to prove an intent to injure the bank through a misapplication of funds. Judge Friendly expressly stated in that case that knowledge that a loan may violate a bank rule will not support a conviction for aiding and abetting under Section

656, 468 F.2d at 993, where the borrower puts "his own credit on the line, and it is not suggested that he lacked the means to repay," *id.* at 995.

Having said all this because I simply cannot reconcile *Docherty* and the instant case, I will confess some uneasiness with the *Docherty* holding because, as foreshadowed by Judge Lumbard's dissent, it carries with it implications for principals as well as aiders and abettors. Judge Lumbard noted in that dissent that if the borrower knows that the loan is in his name solely as a means of avoiding bank rules concerning loans to officers and if that conduct is not enough to prove an intent to injure the bank, then the officer as well as the aider and abettor will escape liability. 468 F.2d at 996-97 (Lumbard, J., dissenting). It may be, as the government has stipulated, that Santiago's wealth eliminated any practical risk to the bank in this transaction, and it may also seem harsh to charge someone who has put his own wealth at risk to the bank with criminal conduct injuring the bank. But that conduct surely facilitated a bank officer's knowing evasion of common and necessary bank rules designed to prevent misapplication of bank funds. I am thus far from certain that Castiglia has not violated Section 656 and the false entries statute in the instant case. Precedents from other circuits collected in footnote 5 of Judge Kaufman's opinion hold that such conduct by a bank officer is criminal. However, if Castiglia did violate the statute, then Santiago and Liffiton surely aided and abetted him.

Had my colleagues sought to overrule *Docherty*, either by an *in banc* decision or through our informal practice of circulation before publication to allow our colleagues to comment or seek an *in banc* ruling, *see United States v. Reed*, 773 F.2d 477, 478 n.1 (2d Cir. 1985), I might have

agreed with them on the merits. Because they have chosen to leave *Docherty* in place, with the confusion that will surely follow, I therefore have no choice but to dissent.

Because Castiglia's conviction for false statements on the bank questionnaires and Liffiton's conviction for perjury are unrelated to the ground for my dissent, I concur in their affirmance. I dissent from the convictions on the other counts for the reasons stated. A final comment on the conspiracy count is necessary. That count included: (i) Castiglia's false statements on the questionnaire; (ii) the failure to disclose Castiglia as the ultimate recipient of the loan proceeds on the loan documents, and (iii) the misapplication of bank funds. Because there were no special verdicts, we cannot tell whether the jury found that the defendants were guilty as to (i) above, a conviction I would be willing to affirm. I would therefore remand the conspiracy count for a retrial.

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit, March 20, 1990.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

OPINION ON PETITION FOR REHEARING

No. 327—August Term, 1989

(Argued November 8, 1989 Decided January 16, 1990)

Petition for Rehearing Filed January 31, 1990

Decided March 20, 1990

Docket No. 89-1207

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER J. CASTIGLIA,

Defendant-Appellant.

Before:

KAUFMAN, TIMBERS AND WINTER,

Circuit Judges.

Petition for rehearing filed by defendant-appellant Peter J. Castiglia, requesting reconsideration of panel's decision upholding his conviction for misapplication of bank funds.

Denied.

JUDITH BLAKE MANZELLA, Buffalo, New York, *for Defendant-Appellant.*

PER CURIAM:

The petition for rehearing is denied. Congressional action to restrict the circumstances under which a bank may make loans to its officers, *see* 12 U.S.C. § 375b (1988), has cast substantial doubt on whether *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972), would be decided the same way today. *See United States v. Castiglia*, No. 89-1207, slip op. at 1125 n.5 (2d Cir., Jan. 16, 1990). To whatever extent language in *Docherty* might appear to be in conflict with our decision in *Castiglia*, our current views, informed by Congressional action, control. This opinion has been circulated to all the active judges of this court prior to filing.

APPENDIX C

Order of the United States Court of Appeals for the Second Circuit, March 23, 1990.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23 day of March one thousand nine hundred and ninety

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United States Court of Appeals
FILED
Mar 23 1990
Elaine B. Goldsmith, Clerk
Second Circuit

89-1207
89-1209
89-1216

UNITED STATES OF AMERICA,

Appellee,

v.

PETER J. CASTIGLIA, JACK LIFFITON, ANTHONY SANTIAGO,

Defendants-Appellants.

Petitions for rehearing containing suggestions that the action be heard in banc having been filed herein by counsels for the defendants-appellants, Peter J. Castiglia and Anthony Santiago and by pro-se-defendant-appellant, Jack Liffiton,

Upon consideration by the panel that heard the appeal, the petitions for rehearing were denied in an opinion issued March 20, 1990.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

Nos. 89-1954 and 89-7702

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANTHONY SANTIAGO, PETITIONER

v.

UNITED STATES OF AMERICA

JACK D. LIFFITON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether accomplices of a bank officer who authorized loans, the proceeds of which went to the officer rather than to the nominal borrowers, and who assured the nominal borrowers that they would not be looked to for repayment, were validly convicted of willful misapplication of bank funds under 18 U.S.C. 656.

2. Whether 18 U.S.C. 656 is impermissibly vague.

3. Whether petitioner Liffiton's rights were violated by the alleged use of leads derived from a state-authorized wiretap in investigating federal banking crimes.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1954

ANTHONY SANTIAGO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 89-7702

JACK D. LIFFITON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a[1]) is reported at 894 F.2d 533.

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[1] The appendix citations are to the appendix in No. 89-1954.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1990. A petition for rehearing was denied on March 20, 1990. The petition for a writ of certiorari in No. 89-7702 was filed on June 4, 1990, and the petition in No. 89-1954 was filed on June 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of one count of aiding and abetting the willful misapplication of bank funds (18 U.S.C. 656), and one count of conspiring to commit that offense (18 U.S.C. 371). In addition, petitioner Santiago was convicted of aiding and abetting the making of false bank entries (18 U.S.C. 1005), and petitioner Liffiton was convicted of making false declarations before a federal grand jury (18 U.S.C. 1623).[2] Petitioner Santiago received a suspended sentence, a three-year term of probation, and a fine of $7,500. Petitioner Liffiton was sentenced to a cumulative term of two years' imprisonment. The court of appeals affirmed. Pet. App. 1a-18a.

1. The facts underlying petitioners' convictions are set forth in the government's opposition to certiorari in *Castiglia*

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[2] Two other co-defendants stood trial with petitioners. Co-defendant Peter Castiglia was convicted of one count of conspiracy to misapply the funds of a federally insured bank (18 U.S.C. 371), two substantive counts of willfully misapplying the funds of a federally insured bank (18 U.S.C. 656), and four counts of making false entries in bank reports (18 U.S.C. 1005). Co-defendant Richard Tocha was acquitted on all counts. The court of appeals affirmed petitioners' convictions in the same opinion that disposed of Castiglia's claims.

v. *United States*, 894 F.2d 533 (2d Cir. 1990), cert. denied, 110 S. Ct. 3238 (1990).[3] Briefly, co-defendant Peter Castiglia authorized a $580,000 loan by the Bank of New York to petitioner Santiago as the nominal borrower; Castiglia assured Santiago that Santiago would not be looked to for repayment. The money was then funneled through a series of transactions to Castiglia, to Castiglia's wholly owned real estate holding company, and to petitioner Liffiton. Liffiton received a total of $188,000 from the $580,000 loan even though his unsecured loans at the bank already exceeded the bank's $1 million lending limit. Santiago, the nominal borrower, received only about $3,500 of the proceeds, and he treated Castiglia as the real borrower. In a subsequent effort to conceal Castiglia's status as the beneficiary of the loan, Liffiton falsely testified before a federal grand jury that he (rather than Castiglia) was the sole shareholder of the real estate holding company. Pet. App. 3a-7a; Gov't C.A. Br. 21-23.

2. Prior to trial, Liffiton moved to dismiss the indictment based upon challenges to state-authorized wiretaps of his residence and a business. A warrant authorizing the wiretaps for a 30-day period had been issued on May 21, 1982, by a New York state judge, Gov't C.A. App. 455-458, based upon an application of the Erie County District Attorney. *Id.* at 409-412. That application was supported by a lengthy affidavit of FBI Agent Joseph R. Coyne detailing the grounds for believing Liffiton was involved in a conspiracy involving narcotics and stolen property. *Id.* at 413-446. On June 18, 1982, the state judge extended the warrant for another 30-day period, *id.* at 469-471, and amended the prior warrant to encompass the state offense of murder and the federal offense of tax evasion, as well as the previously designated state offenses relating to narcotics and

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[3] We have provided each petitioner with a copy of our brief in opposition in *Castiglia*.

stolen property. *Id.* at 475-476. Finally, on October 14, 1983, after the wiretap authorizations had expired but before wiretap evidence had been presented to a federal grand jury investigating Liffiton, the warrant was amended to include conversations relating to violations of federal banking laws. *Id.* at 543-544.

The district court rejected Liffiton's challenge to the sufficiency of Agent Coyne's wiretap affidavit. Based upon the totality of the circumstances and "with deference to the issuing judge's decision," the district court found "that [the issuing judge] had before him adequate evidence to support his finding of probable cause to issue the eavesdropping warrant." Gov't C.A. App. 66-67. The court subsequently denied Liffiton's motion for an evidentiary hearing to challenge Agent Coyne's veracity in attributing information in the wiretap affidavit to unidentified sources. Gov't C.A. App. 139-141. Although the wiretap affidavit did not identify those sources, Liffiton claimed he knew who they were. He submitted an affidavit from a person whom Liffiton claimed to be Source One in the wiretap affidavit. The purported Source One denied having made certain statements that the wiretap affidavit attributed to Source One. Liffiton also offered a hearsay statement by the person Liffiton claimed to be Source Two in the wiretap affidavit. Liffiton said that the purported Source Two had told him he had not made certain statements that were attributed to Source Two in the wiretap affidavit.

Applying the standards of *Franks* v. *Delaware*, 438 U.S. 154 (1978), the district court found that "[a]s to the assumed Source Two, any proof attributable to him must be deemed unreliable in light of the way it has been presented." Gov't C.A. App. 139. With respect to Liffiton's challenge to the statements attributed to Source One, the court found that even assuming Liffiton had made "the substantial initial showing required by *Franks* and that any contradicted

statements in the Coyne affidavit are to be disregarded, enough would remain of the content of that affidavit to establish probable cause upon which to issue a warrant." *Id.* at 140.

The court held an evidentiary hearing on Liffiton's other challenges under the New York and federal wiretap statutes. The court rejected Liffiton's challenge under state law to the wiretap extension order that authorized the district attorney to intercept conversations pertaining to federal income tax violations in addition to the designated state offenses relating to narcotics, stolen property, and murder. Gov't C.A. App. 133-138. Next, relying upon federal case law, the court held that the 15-month delay in amending the wiretap authorization so that it included additional federal banking crimes did not render the communications "unlawfully intercepted" and require suppression of the communications under 18 U.S.C. 2518(10)(a)(i). Gov't C.A. App. 99-101. Instead, the court held that the government simply was required under federal law to have the wiretap authorization amended prior to presenting the fruits of the wiretap evidence to a grand jury, and the court relied upon sworn testimony by the investigating agents and one prosecutor that no such evidence had been presented to the grand jury prior to the amendment. *Id.* at 100-101. Later, the court denied Liffiton's motion for reconsideration, holding that federal law does not prohibit the "nontestimonial" use of intercepted conversations prior to the amendment of the wiretap authorization. *Id.* at 150-151.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court upheld petitioners' willful misapplication and related convictions, for reasons discussed more fully in our brief in opposition in *Castiglia* v. *United States*, *supra*. The court summarily rejected petitioners' other claims of error without discussion. Pet. App. 12a.

ARGUMENT

1. Like Castiglia, petitioners challenge (89-1954 Pet. 8-12; 89-7702 Pet. 7-15) the legal basis upon which they were convicted under 18 U.S.C. 656 for willfully misapplying the funds of a federally insured bank. The Court denied review of Castiglia's identical claims, including his claim that Section 656 is unconstitutionally vague, and there is no reason for a different result here.

a. The Second Circuit held that bank funds are willfully misapplied when the defendant bank officer secretly receives the loan proceeds and assures the nominees that they will not be looked to for repayment, even if the nominal borrowers are creditworthy. Petitioners claim that *United States* v. *Gens*, 493 F.2d 216 (1st Cir. 1974), and *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972), support a contrary theory. In fact, neither case holds that the creditworthiness of a nominal borrower is an absolute shield to liability under 18 U.S.C. 656.

In *Gens*, the First Circuit expressly recognized that criminal misapplication may occur where "bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds." 493 F.2d at 222. Indeed, as the court below observed: "[I]n *Gens* the First Circuit reversed the convictions of nominee borrowers who recognized their repayment obligations, but remanded the one count involving a wealthy individual who signed his note with the understanding that he personally would not have to repay the loan, barring some 'catastrophe.' " Pet. App. 9a (quoting 493 F.2d at 220, 223). Hence, there is no conflict between the instant case and *Gens*.

Similarly, in the Second Circuit's earlier decision in *Docherty*, the defendant named debtor "knew he was

putting his own credit on the line." 468 F.2d at 995. Accord *Gens*, 493 F.2d at 223 & n.15 ("[T]he key point made by [*Docherty* is] that there can be no harm to the bank, and thus no misapplication, where the named debtor is *both* financially capable *and fully intends to repay the loan*." (Emphasis added)). This case is consistent with the result in *Docherty* because Castiglia assured Santiago, the named debtor, that Santiago would not be looked to for repayment.

b. In the alternative, the Second Circuit held that a bank officer's approval of a loan for his own benefit, while concealing his personal interest in the proceeds, constitutes willful misapplication within the meaning of 18 U.S.C. 656. It is true that, prior to this case, the Second Circuit's *Docherty* rule seemed out of step with an otherwise unbroken line of federal circuit court authority finding misapplication whenever a bank officer knowingly caused a "loan to be made to his own benefit, concealing his interest from the bank." *United States* v. *Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969).[4] The Second Circuit in this case, however, disavowed that aspect of *Docherty*. Pet. App. 20a. In addition, it is questionable whether the First Circuit would adhere to the position it adopted in *Gens* with respect to a bank officer's concealment of his interest in a loan in light of the 1978 enactment of 12 U.S.C. 375b, which restricts the circumstances in which a federally insured bank may make loans to its officers. See *United States* v. *Krepps*, 605 F.2d 101, 107 n.21 (3d Cir. 1979).

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[4] See also *United States* v. *Woods*, 877 F.2d 477, 479 (6th Cir. 1989); *United States* v. *Shively*, 715 F.2d 260, 265-266 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Steffen*, 641 F.2d 591, 597 (8th Cir.), cert. denied, 452 U.S. 943 (1981); *United States* v. *Krepps*, 605 F.2d 101, 106-107 (3d Cir. 1979); *United States* v. *Twiford*, 600 F.2d 1339 (10th Cir. 1979); *United States* v. *Kennedy*, 564 F.2d 1329, 1338-1339 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978).

2. Nor is there any merit to petitioners' claims that 18 U.S.C. 656 is unconstitutionally vague. 89-1954 Pet. 9-10; 89-7702 Pet. 7-11. Every court to consider this argument has rejected it. See, *e.g.*, *United States* v. *Krepps*, 605 F.2d 101, 104 n.13 (3d Cir. 1979); *United States* v. *Mann*, 517 F.2d 259, 268 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Cooper*, 464 F.2d 648, 651 (10th Cir. 1972), cert. denied, 409 U.S. 1107 (1973); *United States* v. *Fortunato*, 402 F.2d at 82.

Notwithstanding the consensus of the courts of appeals, petitioners rely upon *United States* v. *Britton*, 107 U.S. 655 (1883), for the proposition that the term "willfully misapplied," as used in an earlier version of the statute, had no settled meaning. 89-1954 Pet. 9-10; 89-7702 Pet. 7. In that case, however, the Court clarified that "the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association." 107 U.S. at 666. Accordingly, the Court held that the criminal sanction did not reach mere "acts of maladministration of the affairs of [a bank] by its officers," but instead was limited to misapplication benefiting the officer or some third party. *Id.* at 668. Consistent with *Britton*, the jury here was instructed that a "mere act of maladministration is insufficient to constitute a violation of the section." 23 Tr. 47. There was ample evidence, including the indisputable facts that Castiglia personally benefited from the loans and took affirmative steps to hide his status from the bank, upon which the jury could base its verdict that Castiglia acted with the necessary criminal intent and that petitioners conspired with him and aided and abetted his unlawful conduct.[5]

[5] Petitioner Liffiton's related challenge (Pet. 16-17) to the sufficiency of the evidence against him is meritless. Liffiton was a prime

Finally, to the extent petitioners seek to raise a facial attack upon 18 U.S.C. 656, their claim must fail because they cannot "demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). Given the district court's detailed instructions that the jury could not convict petitioners under the statute unless Castiglia and petitioners acted with specific criminal intent, see 23 Tr. 30-32, 46-47; see also 23 Tr. 60-63, petitioners cannot raise any colorable claim that the statute was impermissibly vague as applied to them. Cf. *Colautti* v. *Franklin*, 439 U.S. 379, 395 n.13 (1979) ("requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid" (quoting *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945)).

3. There is also no basis for further review of Liffiton's fact-bound challenges (Pet. 17-23) under New York and federal law to the state-authorized wiretaps. As an initial matter, it should be noted that no wiretap evidence was introduced against Liffiton at trial. Moreover, the district court reasonably interpreted New York state law as allowing the state district attorney to obtain authorization to intercept conversations relevant to federal offenses in addition to the designated state offenses listed in the New York statute. See Gov't C.A. App. 133-138. The district court's ruling on this point of state law does not warrant further review by this Court.

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beneficiary of the loan proceeds (receiving $188,000) and took several steps to further the conspiracy and aid and abet the substantive violation, including disbursing the loan proceeds in a manner that concealed the identities of the loan beneficiaries, lying to federal agents and the federal grand jury about Castiglia's status as a beneficiary of the loan, and seeking to procure false testimony by others. Pet. App. 4a-6a.

Nor is further review warranted with respect to the district court's denial of an evidentiary hearing on Liffiton's challenge to the veracity of Agent Coyne's affidavit supporting the wiretap. Consistent with *Franks* v. *Delaware*, 438 U.S. 154, 171-72 (1978), the district court found that, even it Liffiton had made the requisite substantial initial showing of falsity, an evidentiary hearing would not have been required because there was still sufficient information in the affidavit, after disregarding the challenged statements, to establish probable cause. Gov't C.A. App. 139-141. The court unquestionably applied the correct legal methodology under *Franks*, and any remaining fact-specific issues involved in the district court's ruling would not warrant further review.

Finally, there is no merit to Liffiton's claim (Pet. 17-18) that the delay in amending the wiretap authorization to include the interception of conversations related to banking crimes should have precluded federal investigators from pursuing leads to witnesses and evidence revealed in those conversations. As an initial factual matter, we dispute Liffiton's claim that "[w]ithout the benefit of the wiretap the government would never have learned of the transaction in question." *Ibid.* To the contrary, FBI Agent John J. McGuigan testified at the suppression hearing that when the instant investigation began in September 1982, he was not aware of any previous investigation or wiretaps involving Liffiton. See Gov't C.A. Br. 42.

In any event, Liffiton's claim is incorrect as a matter of law because amendment of an authorization order is required only if the government seeks to offer testimony that would disclose "the contents [of the intercepted communications] and any evidence derived therefrom" in a grand jury or trial proceeding. 18 U.S.C. 2517(5). In contrast, the statute expressly provides that where the wiretap intercepts "communications relating to offenses other than those

specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section." *Ibid.* In turn, subsections (1) and (2) of 18 U.S.C. 2517 provide that any agent who has obtained knowledge of the contents of an intercepted conversation through a lawful wiretap "may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure," 18 U.S.C. 2517(1), and "may use such contents to the extent such use is appropriate to the proper performance of his official duties," 18 U.S.C. 2517(2). Thus, the agents here were fully entitled to pursue leads derived from the wiretaps without having to amend the authorization to include the banking crimes upon which Liffiton ultimately was indicted. *United States* v. *Johnson*, 539 F.2d 181, 187 (D.C. Cir. 1976) ("The statute requires prior judicial approval for use of other-crimes fruits of a wiretap, only where the information is to be offered in testimony at a federal or state proceeding."), cert. denied, 429 U.S. 1061 (1977); see also *United States* v. *Donlan*, 825 F.2d 653, 655 (2d Cir. 1987); *United States* v. *Ricco*, 566 F.2d 433, 435 (2d Cir. 1977), cert. denied, 436 U.S. 926 (1978).[6]

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[6] There is no merit to petitioner's claim (Pet. 17-18) that the decision here conflicts with *United States* v. *Marion*, 535 F.2d 697 (2d Cir. 1976), and *United States* v. *Brodson*, 528 F.2d 214 (7th Cir. 1975), both of which involved the presentation of wiretap evidence in grand jury proceedings prior to the amendment of the authorization.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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